

STATE OF ALASKA

IBLA 88-433

Decided December 13, 1990

Appeal of a decision by the Alaska State Office, Bureau of Land Management, approving Native allotment application AA-7611 and rejecting in part State selection AA-208.

Set aside and remanded.

1. Alaska: Native Allotments--Contests and Protests: Government Contests--Rules of Practice: Government Contests

A Native allotment applicant is required to make satisfactory proof of substantially continuous use and occupancy of the claimed land for a minimum of 5 years. Such use and occupancy contemplates substantial actual possession or use of the land at least potentially exclusive of others. Where the record does not establish applicant's qualifying use, the Bureau of Land Management shall initiate a Government contest so that the factual issues can be resolved at a hearing.

APPEARANCES: Lance B. Nelson, Esq., Assistant Attorney General, Anchorage, Alaska, for the State of Alaska; Mark Regan, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for Helen Louise Smith.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

The State of Alaska has appealed a February 10, 1988, decision by the Alaska State Office, Bureau of Land Management (BLM), approving the Native allotment application of Helen Louise Smith (Smith) (AA-7611) and rejecting in part State selection application AA-208.

State selection AA-208 was filed on August 29, 1966, pursuant to the Alaska Statehood Act of July 7, 1958, 48 U.S.C. ch. 2 § 6(b) (1988). On September 8, 1966, AA-208 was amended to include T. 30 S., R. 58 E., Copper River Meridian. 1/

1/ The filing of the State selection had the effect of segregating the selected land, including the land claimed in Smith's application, from all appropriations based upon application or settlement and location. 43 CFR

On November 24, 1971, Smith filed with the Bureau of Indian Affairs (BIA) a Native allotment application for land described as the NW¼, sec. 34, T. 30 S., R. 58 E., Copper River Meridian. 2/ The application was filed pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1988). 3/ The application claims seasonal usage from 1948 for subsistence including trapping, hunting, and berry picking. Included on the application form is a description of utilization of the land by the applicant's ancestors and statements that the applicant's children will continue to use the land. The statement does not mention any use of the claimed land by the applicant herself. 4/

On October 28, 1972, BLM conducted a field examination of the land claimed by Smith. The only evidence of use of the land found by the examiner was one corner marker, bearing the name Louise Smith. The field report indicates Smith was interviewed in her home on October 18, 1972, where the following transpired:

The applicant stated that many of her relatives had used the subject land, and she was claiming the land based on their use. When she was asked what the date of her last visit to the land was, she stated that she had never physically been on the land. She also stated that her husband and son had posted the one corner marker on the land during the summer of 1972. She said that after she received the title to the land her husband was going to build a cabin on the land and then she would use this area.

(Field Report at 2). The field examiner recommended adverse action against the allotment application for failure to show 5 years of qualifying use. Id. at 4.

By letter dated May 27, 1975, Smith was notified of BLM's intention to take adverse action against her application and was given 60 days from receipt of the letter to submit additional information in support of her

fn. 1 (continued)

2013.9-4 (1966) (current version at 43 CFR 2627.4(b)). The State selection also prevented AA-7611 from being legislatively approved pursuant to 43 U.S.C. § 1634(a)(4) (1988). Christine Hansen Monroe, 112 IBLA 181, 182 (1989).

2/ On Nov. 24, 1987, BIA filed an amendment to Smith's allotment application pursuant to 43 U.S.C. § 1634(b) (1988). The new description is the N½ N½ of sec. 34, T. 30 S., R. 58 E., Copper River Meridian. 3/ The repeal of the Act of May 17, 1906, was subject to allotment applications pending before the Department on Dec. 18, 1971. 43 U.S.C. § 1617(a) (1988).

4/ The State asserts that certain statements were written on Smith's allotment application (Statement of Reasons (SOR) at 2), while in fact they were written on a copy of her application, apparently by the field examiner.

claim. Smith submitted no supporting evidence within the 60-day period; however, no action adverse to her allotment was taken by BLM.

On August 13, 1987, Smith submitted five witness statements in support of her allotment application. One statement, signed by Smith, states that she utilized the subject land prior to her 1952 marriage for hunting and trapping, and that she has continued to use the land with her family. She states, "We would mostly visit the land in the fall and winter. It was always daytrips" (Smith Statement at 1). A statement signed by Smith's husband states they have been utilizing the subject land together for hunting and trapping in the fall and winter since about 1950, and at that time Smith "was already familiar with the land through her family and ancestry" (Statement of Marvin L. Smith at 1). The applicant's mother, Esther Hotch, states, "I can remember Louise going over there as a young girl. She would go there with me to visit her grandmother * * *" (Hotch Statement at 1). Hotch continues by stating Smith and her husband have been hunting and trapping on the subject land since before their marriage, and they continue to utilize the land. Edith Jacquot, a good friend of Smith's, states the applicant and her husband started utilizing the subject land when they first met, and that they visit the land in the fall and winter for moose hunting. A statement signed by Judson Cranston, Sr., indicates he is the applicant's uncle and provides further evidence that Smith has been utilizing the subject land with her husband since around 1950 for hunting and trapping.

The appealed decision states: "Based upon adjudication of the application, this office has been determined the applicant has used the lands applied for and satisfies the use and occupancy requirements of the Act of May 17, 1906, supra. At the time the claim was initiated, the lands were vacant, unappropriated and unreserved" (Decision at 2). BLM allowed the parties 60 days for initiation of a private contest. The State allowed the time for filing a contest to expire, electing instead to appeal BLM's decision to this Board.

Appellant contends a contest is required when there is conflicting evidence and cites State of Alaska, 95 IBLA 196, 202-03 (1987); State of Alaska, 85 IBLA 196, 202 (1985); and Katmailand, Inc., 77 IBLA 347, 353 (1983), in support of this proposition. With its SOR the State submits five affidavits which it claims conflict with the witness statements submitted by Smith. 5/ Moreover, the State asserts there is a conflict between the witness statements submitted by Smith in 1987 and the state-ments attributed to her by the field examiner. The State argues that, in

5/ In her answer, Smith moves that the witness statements filed with the State's SOR be stricken from the record, citing Alexandra Atchak, 23 IBLA 81 (1975), for the proposition that evidence submitted for the first time on appeal is ordinarily not considered by this Board. In State of Alaska, 113 IBLA 80 (1990), copies of the same five witness statements which were submitted by the State herein were submitted by the State. In that decision, we denied a motion to strike the witness statements, id. at 83, and we find no relevant distinctions between the two cases. Consequently, the motion to strike the witness statements is denied.

any event, there is no evidence in the record that the applicant's use of the land was potentially exclusive of others, nor is there evidence Smith's use was more than merely intermittent. Citing Angeline Galbraith, 97 IBLA 132, 94 I.D. 151 (1987), aff'd, Angeline Galbraith (On Reconsideration), 105 IBLA 333 (1988), appellant argues the lack of such evidence in the record is justification for initiation of a contest.

Smith argues the record does support the conclusion that her use was sufficient to justify approval of her allotment application and points out that seasonal use and occupancy can be adequate to meet the requirements for a Native allotment. Smith asserts that her 1987 witness statements are more recent and comprehensive than the statements reported by the field examiner. Moreover, Smith maintains that a remand to BLM for issuance of a second decision would be more efficient than initiation of contest proceedings.

[1] A Native allotment applicant must submit satisfactory proof "of substantially continuous use and occupancy of the land for a period of five years." 43 U.S.C. § 270-3 (1970). Such use and occupancy "contemplates the customary seasonality of use and occupancy" but must be "substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use." 43 CFR 2561.0-5(a). To be potentially exclusive of others, use must be such that any person on the land, under normal circumstances, knew or should have known that the land was subject to the claim of another. Angeline Galbraith, 97 IBLA at 169, 94 I.D. at 170-71. Where the alleged use consists of approximately two trips per year to an area for a total of a few days to a week per trip, such use is properly characterized as intermittent use. State of Alaska, 113 IBLA at 84; Angeline Galbraith, 97 IBLA at 165-66, 94 I.D. at 169; United States v. Estabrook, 94 IBLA 38 (1986).

BLM's decision contains no analysis of the facts to support its adjudication, and the record does not support the conclusion that Smith's use of the land constituted substantial, actual possession, at least potentially exclusive of others, rather than simply intermittent use. The record contains evidence on the one hand that Smith stated in 1972 that she had never been on the claimed land (Field Report at 2), and on the other hand that she visited the land (1987 Witness Statements). No effort is made to reconcile this contradictory evidence. All of her trips to the claimed land were day trips (1987 Statement of Smith at 1). The allotment application states there are no improvements on the land (Application at 2). The only mention of any physical evidence on the land concerns a single corner marker, which, according to the field report, was placed on the land by Smith's relatives after it was withdrawn by the filing of the State selection (Field Report at 2).

Where an applicant has not established entitlement to an allotment, BLM is required to provide notice and an opportunity for a hearing at which the applicant may attempt to show compliance. Pence v. Kleppe, 529 F.2d

135 (9th Cir. 1976). As applicant Smith has not established her entitlement, we must remand this matter for initiation of a contest. 6/ A copy of the contest complaint shall be served on appellant which, upon the filing of a proper motion, shall be allowed to intervene.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Alaska State Office is set aside and the case is remanded for initiation of a contest proceeding.

David L. Hughes
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge

6/ The State argues BLM erroneously allowed the allotment description to include part of the Kicking Horse River as the record contains no evidence the applicant utilized the riverbed. Moreover, citing State of Alaska v. United States, 662 F. Supp. 455 (D. Alaska 1987), aff'd sub nom. State of Alaska v. Ahtna, Inc., 891 F.2d 1401 (9th Cir. 1989), the State contends the Kicking Horse River is not available because it is navigable. These issues may be pursued by the State at the contest hearing. State of Alaska, 113 IBLA at 84-85 n.6.